

89-11962

Supreme Court, U.S.

FILED

DEC 6 1989

JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

CLEMENT J. PACYNA, PETITIONER

v.

LEE G. GREENLEY, JOYCE R. GREENLEY,
JOHN LLOYD EGAN, ESQ., and WINTHROP
H. PHELPS, ESQ., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW YORK
COUNTY OF ERIE

BRIEF FOR THE PETITIONER

CLEMENT J. PACYNA
PRO SE
1151 WEHRLE DRIVE
WILLIAMSVILLE, NEW YORK 14221
TELEPHONE (716) 632-4078



QUESTION PRESENTED

Under Real Property Law §329, an action may be taken to have any instrument relating to real property declared void or invalid or cancelled of record.

The question presented in this case is whether petitioner's real property cause of action (1) to void the subject Bond and Mortgage where it was unilaterally wrongfully assigned, proved, recorded and procured by fraud and malfeasance by the co-defendants since 1977, respectively (2) to recast a similar mortgage naming the petitioner and his wife as mortgagees in common and (3) seeking monetary damages, should be dismissed by the hearing court, which substantially ORDERED the co-defendants, respectively, to simply just give back the mortgage to the Pacynas, without damages and deprivation of his State and Federal Constitutional rights?

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OPINIONS BELOW

The Order/Opinion of the court of appeals (App. A), the non final decision (App. C) and the final Order (App. D) of the hearing court are unreported.

JURISDICTION

The Order of the court of appeals was entered on June 1, 1989. A petition for reargument was denied on September 14, 1989 (App. B). The petition for a writ of

certiorari was filed on November 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY
PROVISIONS INVOLVED

1. CONSTITUTION, Amend. 1 provides:

No person shall be denied redress.

2. CONSTITUTION, Amend. V and the New York State's final clause in Article 1, Section 6 provides:

No person shall be deprived of life, liberty, or property without due process of law.

3. CONSTITUTION, Amend. XIV provides:

No person shall be denied equal protection of law, and that no state shall deprive any person of life, liberty or property without due process of law.

4. New York State Civil Practice Law

Rules -(CPLR) at pertinent part provides:

§2002 Error in ruling of court. An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced (shall not be disregarded if a substantial right of a party is prejudiced).

§5513(b) Time to move for permission to

appeal. The time within which a motion for permission to appeal must be made shall be computed from the date of service upon a party seeking permission of a copy of the judgment or order appealed from and written notice of its entry, or ..., except that when such party has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.

§5602(a) provides for appeals to the court of appeals by permission upon direct application 1. in an action originating in a supreme court ..., (ii) from a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601.

5. Rules of the Court of Appeals:

500.11(d) provides permission to appeal in civil cases (1) the moving papers shall be on a single document, bound on the left, and shall contain in the order here indicated, (iii) a statement of the procedural history of the case, including a showing of the timeliness of the motion. If the motion for leave to appeal is made directly to this court, without first having moved at the Appellate Division, the moving papers to this court shall demonstrate timeliness by stating the date movant was served with the order or judgment

sought to be appealed, with notice of entry.

6. New York State Real Property Law (RPL)

at pertinent part provides:

§254 for construction of clauses and covenants in mortgages and bonds.

§258 for forms of deeds/mortgages.

§290 for definitions, effect of article re: "real property", "purchasers", "conveyance" and "recording".

§291 for recording conveyances, being duly acknowledged or proof duly certified.

§292 by whom conveyance must be acknowledged or proved.

§293 for recording of conveyance hereto acknowledged or proved.

§306 for certificate of acknowledgment or proof, and §318 for recording.

§329 authorizes court to declare void or invalid and cancel mortgage where it is improperly recorded.

§330 for officers guilty of malfeasance liable for damages.

7. Judiciary Law §487 provides for officers guilty of malfeasance liable for treble damages.

STATEMENT

Beginning in 1971, the co-defendant LEE

G. Greenley entered into a rental agreement with option to purchase the real property of the petitioner and his wife, Dorothy M. Pacyna (hereafter Pacynas), located at 5208 Genesee Street, Bowmansville, New York (See App. C).

In September 1977, co-defendants LEE G. GREENLEY and his wife, JOYCE R. GREENLEY (hereafter Greenleys) exercised the option to purchase. A closing statement was entered showing \$58,114.60 due the Pacynas or sellers, with a First Purchase Money Bond and Mortgage of \$54,000.00 and a sum of \$4,114.60 due at the time of closing.

A deed was executed by the petitioner and his wife, Dorothy M. Pacyna on 15 and 22 September, 1977, respectively, passing Title of their property to the Greenleys for the consideration of \$1.00 and more (the Bond and mortgage and the sum of \$4,114.60 referred to above).

At the time of closing, neither of the

Pacynas were present (nor notified) when the Bond and Mortgage was executed and filed at closing by the Greenleys and proved by their attorney on 26 September 1977.

Significantly, the Bond and Mortgage filed on 26 September, 1977 at the Erie County Clerk's Office, Buffalo, New York and recorded in Liber 7924 at Pages 433, 434 is formed between the Greenleys or purchasers naming themselves as Mortgagors, and the co-defendants JOHN LLOYD EGAN, attorney (hereafter Egan) and Winthrop H. Phelps, attorney (hereafter Phelps) naming them as the mortgagees, and not the Pacynas or sellers.

A civil action was commenced in 1983 by the petitioner, followed by an application on February 6, 1984 for an Order granting Summary Judgment in his first cause of action to void or cancel the mortgage instrument of record improperly recorded and to recast a similar mortgage

instrument designating the Pacynas as mortgagees in common, and a money judgment in favor of petitioner and against Egan and Phelps in the amount of \$17,000.00 (to be updated) on petitioner's second cause of action for breach of implied contract, negligence, and malfeasance, together with treble damages, costs and reasonable attorney fees. (See RPL §330).

The denial of the application is the subject of appeal covered in the argument.

ARGUMENT

PRELIMINARY STATEMENT

This case at bar should be reversed by itself or upon fall of the related case Pacyna v. Pacyna, Docket No. 89-938, presently before this Court. The two cases are related by virtue of an "agreement" (App. F), *infra*.

The "agreement", dated September 21, 1977, was made between the Pacynas in the Pacyna v. Pacyna case, *supra*, and the

co-defendants Egan, who is also involved in said case, and Phelps, who were the Pacynas' attorneys in a purported pending accounting and divorce action based on a fatally flawed prior matrimonial action.

The "agreement" is affected by the matrimonial action which is the subject of appeal in Pacyna v. Pacyna, supra.

As aforementioned, the deed passing Title to the Greenleys, was signed by petitioner and his wife on September 15 and 22, 1977, respectively.

As aforementioned, the Greenleys signed and recorded the subject Bond and Mortgage on September 26, 1977 soley on the basis of the "agreement". The Bond and Mortgage was proved by their attorney, Richard S.F. Gallivan, unilaterally naming Egan and Phelps mortgagees, without a required written and proved assignment instrument prescribed by the Real Property Law, supra, infra, from the Pacynas.

The petitioner seeks allowance of his petition for a writ of certiorari for the following independent reasons:

a. The court of appeals has so far departed from the accepted and usual course of judicial proceedings,

b. The court of appeals has so far sanctioned the departure from accepted and usual judicial proceedings by the hearing court, and

c. The court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The substantive question involved in this appeal is whether the court of appeals ruled properly that petitioner's motion is dismissed for failure to demonstrate timeliness as required by section 500.11(d)(1)(iii) of that court's Rules of Practice (App. A).

To help clarify the issue involving

timeliness at the court of appeals in this case, the petitioner, based on the facts and evidence on the record on appeal, provides the following argument and authority:

a. That the order when granted by the hearing court or the HON. FRANK R. BAYGER (resigned), Justice Supreme Court, County of Erie, on June 27, 1985 and filed on July 23, 1985, was then a "non final Order" requiring in its decision execution and recording of an assignment of mortgage by Egan and Phelps, upon which the Complaint shall be dismissed (App. C).

b. That where the order appealed from became a "final order" upon the recording of the assignment on November 1, 1988 and notice of entry of assignment was made on petitioner by Phelps on November 10, 1988 (App. E) and where petitioner submitted and served his appeal papers with proof of service on November 29, 1988 and notice

by petitioner's appeal papers constituting entry of the assignment was made on all of the respondents on November 29, 1988, petitioner's appeal is within the time (30 days) required by Rule 500.11(d)(1) (iii) and CPLR 5513(b), *supra*. Therefore, his motion for leave to appeal on a direct application from a final determination of the originating supreme court to the court of appeals is proper and timely, pursuant to CPLR 5602(a)1.(ii), *supra*, where the appellate division has made an order on a prior appeal in the action which necessarily affects the final determination.

Thusly, the appellate division, fourth department's prior order of unanimous affirmance, without opinion, entered on January 24, 1986 (App. G) was rendered on an appeal of the originating court's "non final order or decision on October 11, 1984 (App. C), and prior to that decision's finality on November 1, 1988(App. D).

c. Even though Judge Bayger's Order by itself became a "final order" on November 1, 1988, petitioner's appeal was timely made and in process. To further support his appeal, upon motion for reargument to the court of appeals (App. B) on June 28, 1989, petitioner served with proof of service on that date on all of the respondents, a copy of the "Final Order" granted by the HON. NORMAN E. JOSLIN, J.S.C., County of Erie, on June 13, 1989 (App. D). The "Final Order" by Judge Joslin:

"ORDERED that this Court's finding that the execution and recording of the Assignment of Mortgage Ordered in the Order of Judge Bayger herein having been complied with, the Order therefore is a final order and the Complaint therein is dismissed effective November 1, 1988."

THE HEARING COURT DECISION

The hearing court or Judge Bayger denied petitioner's motion for Summary Judgment together with ancillary monetary relief therein, finding that Egan and Phelps having been named as mortgagees on the

above described mortgage pursuant to the written "agreement" executed by the Pacynas and Egan and Phelps (App. F).

The petitioner vigorously contends that the hearing court's finding on the face is clearly erroneous, arbitrary and capricious and contrary to statutory law and is in conflict with case law. It is further contended that the hearing court's decision is not substantially justified as Judge Bayger deliberately applied the wrong standard of review to the "agreement", substantially prejudicial to the petitioner, raised in POINTS below.

A finding is clearly erroneous, when, although there is evidence to support it the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. U.S. v. United States Gypsum Co., 333 U.S. 364 (1948).

POINT I

Judge Bayger's finding that co-defendants Egan and Phelps were named as mortgagees on the described mortgage pursuant to the written "agreement" executed by the Pacynas, is clearly willfully misrepresentative and is in conflict with the facts and law, as follows:

a. The "agreement" (App. F) clearly does not even remotely mention mortgage, mortgagees or assignment of mortgage, either expressed or implied.

b. The "agreement" is not an assignment of mortgage as it was not executed by the parties in the manner and form nor proved as required by law for the execution of an assignment of mortgage, pursuant to Real Property Law (RPL) §254, §258, §290, §291, §292, §293 and §306, respectively, supra.

c. Therefore, any agreement to sign a mortgage which is not acknowledged or proved as required by the recording statu-

te is not a conveyance, pursuant to RPL §291. Beak v. Walts, et al, 42 NYS2d 652.

d. The "agreement," which was never recorded, was merely a separate escrow agent agreement for the handling of funds derived from the sale of the Pacynas real property in question, pending a purported court action. Further, the "agreement" was not part of the contract between the Pacynas, the sellers, and the co-defendants Greenleys, the purchasers. Case-law holds that a separate agreement is not part of a mortgage. Castelli v. Walton, 112 NYS2d 179, Vt.- Blanchard v. Knight, 146 A2d 173, 121 Vt. 29, Me.- Thompson v. Glidden, 445 A2d 676.

e. The co-defendants Egan and Phelps, who used the separate "agreement" as their defense to justify their being mortgagees on the subject Bond and Mortgage, were not parties to the mortgage, had no legal interest in the mortgage, and had or have no

legal assignment to take from or to pass to the Pacynas.

f. An error in ruling of the court shall not be disregarded where a substantial right of plaintiff is prejudiced, pursuant to CPLR §2002. Further, the findings of a court may not be upheld if based upon an erroneous finding or view of law. Ritter v. Morton, 513 F.2d 942.

POINT II

Judge Bayger's decision to submit Order (App. C), which:

"ORDERED upon the execution and recording of an additional Assignment of Mortgage by Attorneys John Lloyd Egan and Winthrop H. Phelps, transferring their interest in the subject mortgage to Clement J. Pacyna and Dorothy M. Pacyna, the Complaint herein shall be dismissed", is deceptively misrepresentative of justice, contravenes state and federal constitutional and statutory provisions, and constitutes an abuse of judicial discretion beyond all permissible borders, for reasons above mentioned and as follows:

Judge Bayger created his own authority to satisfy his own idea. He had no power, conferred by law, to make an assignment or to order any additional assignment of mortgage, as none existed for the reasons set forth in POINT I above. Therefore, Judge Bayger could only void the Bond and Mortgage and recast it where it is improperly recorded, pursuant to RPL §329. Gottlicher v. Wille, 156 AD 392, 134 NYS 977.

POINT III

Judge Bayger's finding that under the initially required terms of the Pacynas judgment of divorce and thereafter judgments for support arrearages by Mrs. Pacyna, the plaintiff has no cause for complaint against any of these defendants, is erroneous, arbitrary, capricious and contrary to the facts and law raised above and as follows:

a. As aforementioned, upon fall of the Pacyna v. Pacyna case, supra, the divorce

decree based on same is also invalid.

b. Assuming for the moment that the divorce decree is valid, the divorce decree granted on February 15, 1978 and Judge Bayger's decision made on October 11, 1984 are in substantial conflict.

c. The divorce decree, which bears Egan's name as the preparer of it on his office legal paper, in pertinent part on page 6 in one of its orders thereof, names the Pacynas as mortgagees in common of the subject mortgage on file, where Judge Bayger's decision (App. C) found that Egan and Phelps were the mortgagees, both, of course, which are erroneous for the reasons raised in POINTS above.

d. The reliance on the "agreement" and divorce decree by Egan and Phelps and the Greenleys, respectively, have interferred with and prevented:

(1) The mortgage formed and recorded in the names of the Pacynas as mortgagees

in common since its inception on September 26, 1977, prior to the divorce decree granted in 1978, supra,

(2) The payment to petitioner of his 50% interest or \$234.32 due him monthly in the mortgage since September 26, 1977,

(3) The payment of the mortgage in full by the Greenleys continuing due and payable on or since September 26, 1987, pursuant to the terms of the Bond and Mortgage itself and contract between the Pacynas and Greenleys, or

(4) Renewal (if) authorized by the Pacynas of the mortgage due and payable on September 26, 1987 at a higher interest percentage rate after ten (10) years of the initial mortgage date on September 26, 1977, and

(5) Utilization by the petitioner of his equity in the mortgage, or assignment by him of his interest in the mortgage to his heirs or others since 1977.

THE COURT OF APPEALS DECISION

The court of appeals found that petitioner's application for leave to appeal was untimely (App. A).

As aforementioned, petitioner vigorously contends that the court of appeals finding is erroneous, arbitrary, capricious and contrary to the facts and statutory and constitutional provisions. It is further contended that petitioner's application under CPLR §5602 was timely, pursuant to Rule 500.11(d)(1)(iii) and CPLR 5513(b).

Significantly, the court of appeals is restricted to entertain appeals only on final orders or judgments pursuant to CPLR 5601(b) (as of right) and CPLR 5602(a)1.(ii) (by permission), supra.

It is clearly evident that the court of appeals mistakenly based its finding on Judge Bayger's non final order filed on July 23, 1985 instead of petitioner's presenting it when it became final on the

notice of entry on November 10, 1988 of the recording of the mortgage made on November 1, 1988 (App. E) or the court's final order granted on June 13, 1989, setting November 1, 1988 as the effective date of finality (App. D).

Therefore, pursuant to CPLR §5602, *supra*, the court of appeals had no authority to hear an appeal on the matter until November 1, 1988 or June 13, 1989, *supra*.

In light of the intervening circumstances of substantial or controlling effect in this case involving grossly erroneous court rulings, violations of petitioner's First, Fifth and Fourteenth and State rights, and substantial prejudice committed against petitioner, petitioner respectfully asks for an Order of this Court for:

1. Reversal of the Order of the court of appeals entered on June 1, 1989 (App. A).

2. Reversal of the Orders of the supreme court of New York, Erie County, granted on June 27, 1985 and June 13, 1989 (App. D).

3. Voiding the Bond and Mortgage and Assignment of Mortgage improperly recorded on September 26, 1977 and November 1, 1988, respectively, and recasting a similar mortgage naming Clement J. Pacyna and Dorothy M. Pacyna as mortgagees in common effective September 26, 1977, pursuant to RPL §329.

4. Restitution or payment of damages upon reversal of the above orders, pursuant to CPLR §5015(d) and treble damages (totaling in excess of \$101,226.00) for malfeasance by court officers or attorneys Egan and Phelps, pursuant to Judiciary Law §487.

CONCLUSION

From the foregoing it is clear that the court of appeals and hearing court have decided important questions of federal

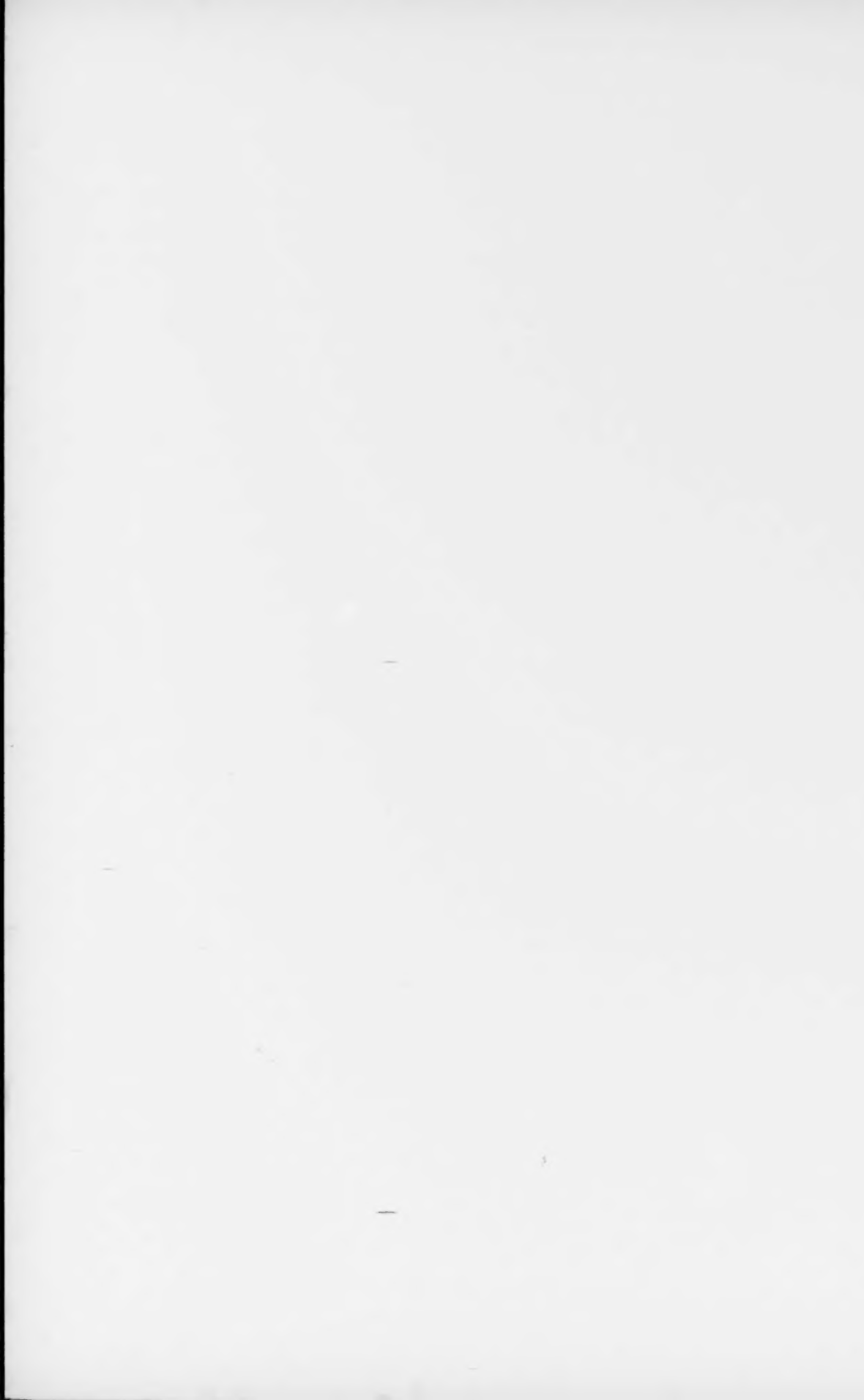
law affecting petitioner and the public in general, which have not been, but should be, settled by this Court.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

S/ Clement J. Pacyna
T/ CLEMENT J. PACYNA, Pro se
1151 Wehrle Drive
Williamsville, New York 14221
Telephone: (716) 632-4078

Dated: November 28, 1989



APPENDICES



A
STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court
of Appeals Hall in the City of Albany on
the first day of June A.D. 1989

PRESENT, HON. SOL WACHTLER, Chief Judge
presiding.

Clement J. Pacyna,
Appellant,
v. Mo. No. 80
Lee G. Greenley, et al.,
Respondents.

A motion for leave to appeal to the
Court of Appeals in the above cause having
heretofore been made upon the part of the
appellant herein and papers having been
submitted thereon and due deliberation
having thereupon had, it is

ORDERED, that the said motion be and the
same is dismissed for failure to demon-
strate timeliness as required by section
500.11(d)(1)(iii) of this Court's Rules
of Practice.

S/ Donald M. Sheraw
T/ Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court
of Appeals Hall in the City of Albany on
the fourteenth day of September A.D. 1989
PRESENT, HON. SOL WACHTLER, Chief Judge,
presiding.

Clement J. Pacyna,
Appellant,
v. Mo. No. 875
Lee G. Greenley, et al.,
Respondents.

A motion for reargument &c to the Court
of Appeals in the above cause having been
heretofore made upon the part of the
appellant herein and papers having been
submitted thereon and due deliberation
thereupon had, it is

ORDERED, that the said motion insofar as
it seeks reargument be and the same hereby
is denied; and it is

ORDERED, that the said motion otherwise
be and the same hereby is dismissed.

S/ Donald M. Sheraw
T/ Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

CLEMENT J. PACYNA,
Plaintiff,
vs.

LEE J. GREENLEY, JOYCE R.
GREENLEY, JOHN LLOYD EGAN, ESQ.,
and WINTHROP H. PHELPS, ESQ.,
Defendants.

TIMOTHY R. LOVALLO, For Plaintiff

RICHARD J. SHERWOOD, For Lee Greenley

RICHARD S.F. GALLIVAN FOR Joyce R.
Greenley

JOSEPH J. THOMAS (John L. Egan, of
counsel) For John L. Egan

McKEE, PHELPS & BOWMAN (Winthrop Phelps,
of counsel) For Winthrop Phelps

DECISION

FILED
ERIE COUNTY
CLERK'S OFFICE
OCTOBER 24, 1984

Frank R. Bayger, J.,

The plaintiff has moved for summary
judgment directing reformation of a certain
bond and mortgage so as to substitute the
plaintiff and his former wife, Dorothy M.

Pacyna, as mortgagees in place of the defendants Egan and Phelps; and granting money damages for those defendants' alleged negligence, malfeasance and breach of contract. The purchase money bond and mortgage in question was given by the defendants Greenley in connection with their purchase of the Pacynas' jointly owned commercial property. The property was sold during the pendency of the Pacynas' protracted matrimonial litigation in which the parties were represented by attorneys Phelps and Eagan (sic) respectively. The attorneys were named as mortgagees pursuant to the Pacynas' prior written agreement which designated those individuals as joint escrow agents to receive and hold any and all funds realized from the sale pending some further agreement of the parties or a dispositive Order of the Supreme Court. The mortgage was also prepared, executed and recorded in that

fashion with the knowledge and consent of attorney James Owens who represented Mr. Pacyna at the closing.

The Pacynas' matrimonial action was thereafter resolved by stipulation of the parties and the entry of a default judgment of divorce against the present plaintiff. Pursuant to that stipulation and the terms of the judgment of divorce, the defendants Eagan (sic) and Phelps paid all escrowed funds thereto received under the Greenley mortgage to Mrs. Pacyna in partial satisfaction of the husband's accrued support arrearages and other obligations. An assignment of their mortgage interest to Mr. & Mrs. Pacyna was thereafter forwarded to Mr. Owens but apparently never recorded or delivered to either Pacyna prior to Mr Owens' death. In the meantime, the Greenleys have continued to pay their mortgage payments directly to Mrs. Pacyna as initially required by the terms of the Pacynas'

judgment of divorce and thereafter by Mrs. Pacyna's subsequent judgments for support arrearages. Under these circumstances the plaintiff has no cause for complaint against any of these defendants and upon Messrs Eagan (sic) and Phelps' execution and recording of another assignment of mortgage, the complaint herein shall be dismissed.

Submit order.

DATED October 11, 1984
Buffalo, New York

S/ Frank R. Bayger
T/ Hon. FRANK R. BAYGER
Justice of the Supreme Court

At a Special Term, Part 21, of
the Supreme Court of the State
of New York, Erie County, held
at 50 Delaware Avenue, Buffalo,
New York, on June 13, 1989.

PRESENT: HON. NORMAN E. JOSLIN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

CLEMENT J. PACYNA,
Plaintiff,
v.

FINAL ORDER

LEE G. GREENLEY, Index No. H-34768
JOYCE R. GREENLEY,
JOHN LLOYD EGAN, ESQ., and
WINTHROP H. PHELPS, ESQ.,
Respondents.

ERIE COUNTY CLERK'S OFFICE
FILED
JUN 21 1989

Upon the Order of this Court granted on
June 27, 1985 by the HON. FRANK R. BAYGER
(Resigned from the bench), J.S.C., Erie
County, which Order "ORDERED upon execu-
tion and recording of an additional
Assignment of Mortgage by Attorneys John
Lloyd Egan and Winthrop H. Phelps, trans-
ferring their interest in the subject
mortgage to Clement J. Pacyna and Dorothy

M. Pacyna the Complaint herein shall be dismissed", the Assignment of Mortgage executed on November 5, 1985 and recorded on November 1, 1988, recorded in Liber 10179, Page 128 of Mortgages in the Office of the Clerk of the County of Erie by John Lloyd Egan Attorney and Winthrop H. Phelps, Attorney, as joint escrow agents for Clement J. Pacyna and Dorothy M. Pacyna, with offices at 17 Court Street, Buffalo, New York, assignors, in consideration of one Dollar, (\$1.00) paid by CLEMENT J. PACYNA and DOROTHY M. PACYNA assignees, hereby assigned unto the assignees, a certain mortgage made by LEE G. GREENLEY and JOYCE R. GREENLEY, his wife, residing at 5208 Genesee Street, Buffalo, New York, given to secure payment of the sum of Fifty-four Thousand and 00/100 Dollars and interest, dated the 26th day of September 1977 recorded on the 26th day of September 1977 in the

Office of the Clerk of the County of Erie
in Liber 7924 of Mortgages, at Page 433
covering premises, together with the Bond
and obligation described in said mortgage,
and the moneys due and to grow due thereon
with the interest, to have and to hold the
same unto the assignee, and to the succes-
sors, legal representatives and assigns
unto the assignee forever, and upon all
prior pleadings and proceedings heretofore
had herein, and due deliberations having
been had and in the interest of the parties
herein, it is hereby,

ORDERED, that this Court's finding that
the execution and recording of the Assign-
ment of Mortgage ORDERED in the Order of
Judge Bayger herein having been complied
with, the Order therefore is a final Order
and the Complaint therein is dismissed
effective November 1, 1988.

S/ Norman E. Joslin
T/ NORMAN E. JOSLIN, J.S.C.

ENTER: GRANTED June 13, 1989
Gertrude Schwab, Spec. Dep. Clerk

E

McKEE, PHELPS & BOWMAN
Attorneys at Law

JOHN M. McKEE
WINTHROP H. PHELPS
WALTER D. BOWMAN

SUITE 1730-Liberty Building
420 MAIN STREET
BUFFALO, NEW YORK 14202
(Area Code 716) 856-3534

November 10, 1988

Clement J. Pacyna
1151 Wehrle Drive
Williamsville, NY 14221

Mr. Pacyna:

Enclosed please find the Assignment of
Mortgage, which I recorded in the Erie
County Clerk's Office on November 1, 1988.

Very truly yours,

S/ Winthrop H. Phelps
T/ Winthrop H. Phelps

WHP/ckc

Enclosure

AGREEMENT

THIS AGREEMENT, made by and between CLEMENT J. PACYNA, of 1151 Wehrle Drive, Williamsville, New York, and DOROTHY M. PACYNA, of 117 Cornell Drive, Depew, New York (owners of premises No. 5208 Genesee Street, Bowmansville, New York), and JOHN LLOYD EGAN, Attorney, and WINTHROP H. PHELPS, Attorney, as joint escrow agents, the latter parties of which are appointed herein as joint escrow agents to hold any and all funds derived from the sale of the aforementioned premises, after deducting the following sums of money at the closing:

- 1) Payment of a \$1,000.00 check plus interest of 8-1/2% from September 4, 1975, payable to DOROTHY M. PACYNA, which represents the monies due and owing pursuant to a promissory note to the said DOROTHY M. PACYNA, said promissory note being dated September 4, 1975.
- 2) Payment of 5-1/2% brokerage commission

to Theodore Brunea, of Lancaster, New York, which said commission are based upon the final sale price of the aforementioned premises, 5208 Genesee Street, Bowmansville, New York, less brokerage commissions already paid to the aforementioned broker in the sum of approximately \$360.00 per year for a period of approximately six and one-half years last passed.

3) All closing costs and attorney fees due and owing JAMES E. OWENS, attorney on the closing of the aforementioned premises known as 5208 Genesee Street, Bowmansville, New York.

That following the closing of said premises and after deducting the aforementioned sums of money, said funds as aforementioned, the balance there of, shall be held in a joint checking account and/or savings account in the joint names of said escrow agents, and said funds shall be kept and retained in said joint checking account

and/or savings account in the names of both escrow agents pending the receipt by said escrow agents of a stipulation and/or agreement entered into by both parties (CLEMENT J. PACYNA and DOROTHY M. PACYNA), as to the distribution of such funds and/or pending further order of the Supreme Court of Erie County, New York, as to the distribution of the aforesaid escrowed funds, wherein a Supreme Court action is presently pending seeking an accounting of the aforementioned funds, including any and all rental funds, income funds derived from the ownership of said property, and/or the sale of said property.

It is further agreed by both parties (CLEMENT J. PACYNA and DOROTHY M. PACYNA) that said parties will simultaneously execute a deed to effectuate the sale of said premises, and neither of the said parties in any way will frustrate the orderly closing of said premises.

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DATED: September 21, 1977.

S/ Clement J. Pacyna
T/ CLEMENT J. PACYNA

S/ Dorothy M. Pacyna
T/ DOROTHY M. PACYNA

S/ John Lloyd Egan
T/ JOHN LLOYD EGAN

S/ Winthrop H. Phelps
T/ WINTHROP H. PHELPS

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

PRESENT: CALLAHAN, J.P., DENMAN, BOOMER,
PINE, SCHNEPP, JJ.

Clement J. Pacyna, Appellant,

v.

No. 1273

Lee G. Greenley, Joyce R. Greenley,
John Lloyd Egan, Esq., and Winthrop
H. Phelps, Esq., Respondents.

The above named Clement J. Pacyna having
appealed to this Court from an order of
the Supreme Court, entered in the Erie
County Clerk's office on July 23, 1985 and
said appeal having been submitted by
Clement J. Pacyna appellant, John Egan for
respondent Egan and due deliberation having
been had thereon,

It is hereby ORDERED, that the order so
appealed from be and the same hereby is
unanimously affirmed with costs.

Entered: JAN 24 1986

S/ Carmen S. Leone
T/ CARMEN S. LEONE, Clerk